1992

# The State of Utah v. Julie Harmon : Reply Brief

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

DOCKET NO. 920463CA

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| STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| JULIE HARMON, | : | Case No. 920463-CA<br>Priority No. 2 |
| Defendant/Appellant. | : | |

# REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. section 58-37-8, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Anne M. Stirba, Judge, presiding.

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## STATUTORY PROVISION

Appendix 1 to this brief contains a copy of Utah Code Ann. section 77-7-18, the only statutory provision specifically discussed in this reply brief.

## SUMMARY OF ARGUMENT

For a reason different from the State's, Ms. Harmon agrees with the State that this Court need not rest the decision of this case on the pretext doctrine. This Court can dispose of the case with a simple holding that the search was conducted pursuant to involuntary consent. Should this Court choose to reach the legality of the initial traffic stop, the State cannot meet its burden to justify Detective Russo's conduct under either the pretext doctrine or the scope analysis championed by Judge Russon in his concurring and dissenting opinion in State v. Lopez, 831 P.2d 1040 (Utah App. 1992).

## ARGUMENT

### I.
### CONSENT DOES NOT SATISFY THE STATE'S BURDEN TO JUSTIFY THE WARRANTLESS SEARCH AND SEIZURE OF MS. HARMON.

A. All the Facts and Circumstances are in Issue.

The State begins its consent analysis by arguing that "[o]nly the home search is in issue."[1] The argument is apparently designed to give the State the appearance of consistency in the State's varied positions concerning whether or not the pretext

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1. The State argues,

> As a preliminary matter, the scope of this appeal must be understood. Defendant's plea-supported conviction is only for possession of methamphetamine -- contraband that was found upon the search of her home. The charge of unlawful possession of prescription medications, arising from the earlier, incident-to-arrest search of defendant's purse, was dismissed following the preliminary hearing (R. 7, 365).
>
> Therefore, the question of the propriety of the search conducted incident to defendant's arrest has no direct bearing upon the parties' respective rights regarding defendant's conviction. Therefore, the question is moot, see Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989), and under Rule 37, Utah Rules of Appellate Procedure (mootness), this Court ought not to review it.
>
> Because the search incident to defendant's arrest is a moot question, the State's acknowledgment that pretext doctrine may have a place in the arrest context (Opening Br. of Appellant at 11 n.2) is less significant to this case than it might otherwise be. This is because any possible misuse of misdemeanor arrest power here did not directly yield evidence that might be subject to the exclusionary rule under search and seizure law. Only the subsequent home search yielded such evidence.

Brief of Appellee at 11-12.

doctrine applies in the case of a warrantless arrest.[2] To the extent that the State's argument may be interpreted as contending that the facts prior to the search of Ms. Harmon's home are not relevant, the argument is mistaken. The evidence and argument presented by both parties in the trial court, and the trial court's memorandum decision and findings of fact and conclusions of law properly encompassed all the facts and circumstances involved in the entire encounter between Ms. Harmon and Detective Russo (R. 30, 65-11, 79-92, 104-109, 196-309, 126-193). Ms. Harmon properly entered a Sery plea reserving her right to appellate review of the trial court's entire disposition of her motion to suppress (R. 95).

This Court should reject the State's efforts to limit the relevant facts of this case. See e.g. State v. Lopez, 831 P.2d 1040 (Utah App. 1992)(reviewing "the underlying facts" "in detail," including the officer's encounters with Mr. Lopez that occurred weeks prior to the traffic stop at issue on appeal).

B. The State Does Not Carry Its Burden to Show Voluntary and Untainted Consent.

1. The consent was not voluntary.

Without citing any authority for the surprising proposition, the State argues that the burden to prove the voluntariness of Ms. Harmon's consent was on the State in the trial court, but that the burden shifts to Ms. Harmon to disprove the

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2. Compare brief of Appellee at 11-12 with brief of Appellee at 23 and n.6, and at 33-40, and with reply brief of Appellee in State v. Lopez, Case No. 900484-CA, at 5.

voluntariness of her consent on appeal because the trial court sided with the State in the trial court. Brief of Appellee at 13. The State is mistaken. It is the State's burden to justify warrantless searches in the trial court, and the State's burden remains with the State on appeal. See e.g. State v. Thurman, 203 Utah Adv. Rep. 18, 23 (Utah 1993).

In addressing the merits of the voluntariness issue, the State condenses many factors to be assessed into two -- whether the consent was clear and specific.[3] If adopted by this Court, the State's compression of the analysis would omit critical factors such as whether the State presents convincing evidence on appeal that the consent was not only clear and specific, but also

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3. The State argues,

> In Webb, this Court listed three factors for determining voluntary search consent:
>
> (1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given";
> (2) the government must prove consent was given without duress or coercion, express or implied; and
> (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

790 P.2d at 82 (quotations and citations omitted). The third factor actually describes the State's trial court burden, and otherwise repeats the first factor, regarding "clear and "specific" evidence supporting voluntariness. The State therefore addresses the first and third Webb factors together.

Brief of Appellee at 13-14. The State then focuses exclusively on whether the consent was clear and specific. Id. at 14.

unequivocal, knowingly given, and freely given.

In arguing that the consent form presents clear and specific consent, the State mistakenly omits the problematic language in the form, that referring to the "rights" "per Miranda" to have a search without a warrant, and to refuse to consent to a warrantless search. Compare Appendix 3 of Appellant's opening brief with Appellee's brief at 14. According to Detective Russo, he informed Ms. Harmon of her Miranda rights before he placed her in his police car, and on the way to the jail before the consent (R. 207-208). The Miranda warnings have nothing to do with the right to refuse to consent to warrantless searches.[4] Ms. Harmon's signature of the form indicating that she waived her right to refuse a warrantless search on the basis of having been informed "per Miranda" of that right therefore does not provide convincing evidence of a clear, specific or intelligent consent.

The State makes no claim that the consent was unequivocal, nor could it on the record in this case, which indicates that prior to giving the consent, Ms. Harmon twice refused to allow the warrantless search of her home.

In assessing the duress and coercion factor, the State seeks to show "the absence of a claim of authority to search" by Detective Russo and "the absence of deception or trick" on Russo's

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4. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

part by arguing, "Russo expressed no view toward defendant regarding whether a search warrant might be obtained when he first encountered her in her driveway and asked for search consent." Brief of Appellee at 15 (emphasis in original). While the State's representation is true, it is incomplete. Russo did in fact threaten to obtain a warrant. At the preliminary hearing, Russo testified that when Ms. Harmon initially refused to let him in her home, "I told her I'd have to come back with a warrant." (R. 349). At trial, he again stated, "I told her I would have to come back with a search warrant to get in if I didn't do it with her consent." (R. 245). At trial, he admitted that when he told her that he would have to come back with a warrant, he knew he could not obtain a warrant, but did not so inform Ms. Harmon (R. 224-227). Russo admitted in cross and re-cross examination that he told Ms. Harmon that he would have to get a warrant and warned her that it would be unpleasant if he had to resort to a warrant (R. 248-249). He testified on direct examination that after Julie Harmon gave verbal consent to the search on the way to the jail, he told her that he would instead apply for a warrant (R. 209). The State's argument that Ms. Harmon's admissions on the way to the jail provided the probable cause so that Russo could have obtained a warrant does not address his threat to get a warrant before she made the admissions. More importantly, her admissions do not provide legal probable cause for a warrant because they are a fruit of the illegal search and seizure of Ms. Harmon. See e.g. United States v. Karo, 468 U.S. 705, 719 (1984)(validity of issuance of search

warrant requires excising illegally seized evidence from the search warrant affidavit).

While it is true that Russo denied hinting that Ms. Harmon could exchange her freedom from arrest for her consent to search, brief of Appellee at 15-16, his actual behavior clearly implied that the purported arrest for driving on suspension was being used by him as leverage to obtain her consent to the search of the house. Why else did he tell her after arresting her for driving on suspension that he knew that she had drugs in her house and that it would be unpleasant if he were forced to resort to a warrant? (R. 248-251). Detective Russo's statement to Ms. Harmon that he was concerned that he might appear coercive, brief of Appellee at 15-16, hardly disproves the fact that he was being coercive. See State v. Webb, 790 P.2d 65, 81 (Utah App. 1990("[T]he government must prove consent was given without duress or coercion, express or implied.")(citations omitted).

While it is arguable that Ms. Harmon's consent was not obtained by an exhibition of force, brief of Appellee at 15-16, given that Russo had four officers present when he arrested Ms. Harmon for driving on suspension, confiscated her money and apparently illegal prescription drugs, handcuffed her, threatened to get a warrant and mentioned that that experience would be unpleasant, and drove her toward the jail, it is equally arguable that the consent was obtained by an exhibition of force. On these facts, the State does not meet its burden present convincing evidence to overcome the presumption against the waiver of Ms.

Harmon's rights.

The State's arguments that after the arrest, Russo's conduct was "even less than a mere request" to search, and that Ms. Harmon was cooperative in "spontaneously proffering her consent" brief of Appellee at 17, are mere conclusions that are not and cannot be supported with accurate and complete citations to the record. In these circumstances, the State has failed to carry its burden.

The State's final argument going to duress and coercion, that the consent form goes beyond current constitutional requirements in informing Ms. Harmon of her right to refuse to consent to the warrantless search, brief of Appellee at 17, again overlooks how the consent form confused the Miranda warnings with an informed waiver of Ms. Harmon's right to refuse a warrantless search of her home. See Appendix 3 to opening brief of Appellant.

Had there been no taint from Detective Russo's illegal conduct, the State could not meet its burden on appeal to demonstrate convincing proof of voluntary consent. Particularly because of Detective Russo's illegal conduct, discussed infra, the State fails to meet the higher burden of proof of voluntariness. See e.g. State v. Robinson and Towers, 797 P.2d 431, 437 (Utah App. 1990)("[A] prosecutor attempting to prove voluntary consent after illegal police action 'has a much heavier burden to satisfy than when proving consent to search' which does not follow police misconduct.")(citations omitted).

2. The consent was not obtained by means distinguishable from Detective Russo's illegal conduct.

In seeking to demonstrate that Ms. Harmon's consent was obtained by means distinguishable from Detective Russo's misconduct, the State relies on portions of State v. Thurman, 203 Utah Adv. Rep. 18 (Utah 1993). Brief of Appellee at 17-23. A complete and accurate application of Thurman demonstrates that the State cannot meet its burden to prove untainted consent to justify Detective Russo's conduct.

In Thurman, the court began its discussion of the State's burden to prove that consent is not tainted by preceding illegalities by focusing on the operant policy consideration, stating,

> The principle underlying the exploitation test is that the Fourth Amendment should not permit law enforcement "to ratify their own illegal conduct by merely obtaining a consent after the illegality has occurred." Arroyo, 796 P.2d at 689. Arroyo's primary goal was to deter the police from engaging in illegal conduct even though that conduct may be followed by a voluntary consent to the subsequent search.
>
> The deterrence rationale discussed in Arroyo is grounded in the United States Supreme Court's decision in Brown v. Illinois, 422 U.S. 590 (1975). There, Justice Powell, in a concurring opinion joined by now Chief Justice Rehnquist, made it clear that the analysis used to invalidate consent on the basis of exploitation was grounded firmly in the deterrent purposes of the exclusionary rule. Id. at 608-12. Justice Powell's admonition that the exploitation analysis "always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus," id. at 612, has become a cornerstone of search and seizure jurisprudence.

203 Utah Adv. Rep. at 21 (citations omitted).

The State correctly states the relevant factors to be considered in the analysis: "'the purpose and flagrancy of the official misconduct,' the 'temporal proximity' of the illegality and the consent, and 'the presence of intervening circumstances.'" Thurman at 21, quoted in brief of Appellee at 18. Because the State apparently fails to appreciate the importance of the deterrence rationale in Thurman, the State's application of the factors is incorrect.

In discussing the "purpose and flagrancy" factors, the Thurman court emphasized the operant policy considerations, stating,

> The "purpose and flagrancy" factor directly relates to the deterrent value of suppression. As Justice Powell noted in Brown, "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." Thus, if the police had no "purpose in engaging in the misconduct -- for example if the illegality arose because we later invalidated a statute on which the police had relied in good faith -- suppression would have no deterrent value. At the other extreme, if the purpose of the misconduct was to achieve the consent, suppression of the resulting evidence clearly will have a deterrent effect and further analysis rarely will be required. Similarly, if the misconduct is flagrantly abusive, there is a greater likelihood that the police engaged in the conduct as a pretext for collateral objectives, and suppressing the resulting evidence will have a greater likelihood of deterring similar misconduct in the future.

Thurman at 21-22 (citations omitted).

In its analysis of the purpose and flagrancy factors, the State argues that Detective Russo initially had a purpose to investigate Ms. Harmon's drug possession, an "interest" that was

sustained throughout the entire scenario, but that he really acted on a valid "new purpose" to enforce the traffic code. Brief of Appellee at 18. The problem with the argument is that Russo never did enforce the traffic code; Ms. Harmon was never cited for or charged with driving on suspension. A correct application of Thurman demonstrates that when Detective Russo arrested Ms. Harmon "for driving on suspension," his purpose was to achieve her consent to the warrantless search of her home. The arrest was a "pretext for collateral objectives," Thurman, supra, heightening the deterrent value of suppression in this case. See id.

Contrary to the State's arguments at page 19 of Appellee's brief, Ms. Harmon has not distorted Detective Russo's allegations that Ms. Harmon was a rumored drug lord with all of the drugs in Columbia in her house (R. 348, 228), and Ms. Harmon has never contended that Russo was acting illegally in making these comments. Ms. Harmon has included these facts in her brief because they are relevant to demonstrate Detective Russo's intention from the outset of the encounter with Ms. Harmon.

In arguing that the arrest was not flagrant misconduct, the State goes so far as to imply that at the time of the arrest, all police officers had a legal duty to arrest all violators of the traffic code,[5] and that Detective Russo should have arrested Ms.

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5. The State argues,

> Because section 41-1-17 stated that officers shall make arrests for Motor Vehicle Act violations, Russo's discretion was legislatively directed against merely citing defendant for

(footnote continues)

Harmon for driving on suspension. Brief of Appellee at 20 and n.5. The State's argument fails to note the fact that Utah Code Ann. section 77-7-18, in effect at the time of the arrest, provided that Ms. Harmon's violation of the traffic code could be resolved by a citation. That section states,

> A peace officer, in lieu of taking a person into custody, any public official of any county or municipality charged with the enforcement of the law, and personnel employed at an inspection and checking station or port of entry under Section 27-12-19 may issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor or infraction charge to appear at the court of the magistrate before whom the person should be taken pursuant to law if the person had been arrested."

Russo had no legal duty to arrest Ms. Harmon.

Russo's conduct was flagrant misconduct. The evidence in this case demonstrates that his arrest of Ms. Harmon for driving on suspension deviated from the normal course of issuing a citation, and conflicted with the presumptive policy in place at the jail at

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(footnote 5 continued)

> driving under suspension a class C misdemeanor.
>
> In the rewritten Motor Vehicle Act, effective in 1992, section 41-1-17 was replaced by Utah Code Ann. §§41-1a-107, 41-3-105(8)(a) (Supp. 1992). Those provisions lack the mandatory "shall" arrest language of section 41-1-17, applicable at the time of defendant's 1991 arrest, except for certain offenses not appearing to include driving under suspension. It thus appears that the power to make an arrest for driving under suspension. It thus appears that the power to make an arrest for driving under suspension now falls within the permissive "may" language of Utah Code Ann. §77-7-2 (1990).

Brief of Appellee at 20 and n.5 (emphasis in original).

the time of the arrest not to incarcerate those driving on suspension. Detective Russo in fact did not enforce the traffic code in this case, but was simply using the traffic arrest as a pretext to achieve his collateral objective, obtaining Ms. Harmon's consent to the warrantless search of her home.

The State argues that Detective Russo's conduct was not flagrant and that deterrence would not be served by suppressing the evidence in this case because the Lopez decision was not yet published at the time of this arrest. Brief of Appellee at 21. At the time of the arrest, Detective Russo should have known better than to arrest Ms. Harmon and threaten her with the unpleasant prospect of his having to obtain a warrant in order to obtain her consent to search her home in order to investigate a confidential informant's tip that Ms. Harmon was involved in illegal drugs. See e.g. United States v. Lefkowitz, 285 U.S. 452, 467 (1932)("An arrest may not be used as a pretext to search for evidence."); State v. Arroyo, 796 P.2d 684 (Utah 1990)(condemning pretextual use of traffic stop to investigate driver).

The State's argument concerning the temporal proximity factor is incomprehensible to counsel for Ms. Harmon.[6] The State

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6. The entirety of the State's argument is as follows:

> Turning to temporal proximity of the arrest and the consent, this factor is less helpful in attenuation analysis here. See Sims, 808 P.2d at 151 & n.19 (Time ranging form "brief conversation" to two hours not significant for attenuation). The time to travel some seventy to ninety blocks, in police custody (Opening Br. of Appellant at 6), does not, by itself, appear highly significant.

Brief of Appellee at 21-22.

argues that Ms. Harmon's "spontaneous" offer of consent and the absence of flagrant police misconduct provide intervening circumstances sufficient to attenuate the consent from the illegal arrest. Brief of appellee at 22-23.

Reference to Thurman is again helpful. In Thurman, the court explained the "temporal proximity" and "intervening circumstances" factors together in light of the deterrence theory underlying the taint analysis, stating,

> Courts should also consider the time that elapsed between the illegality and the giving of the consent and the presence or absence of intervening events that might be relevant to attenuation. The deterrence principle also underlies these factors. The deterrent value of suppressing evidence seized following police illegality is negligible where the subsequent consent to search is substantially separated either temporally or circumstantially from that illegality. As one commentator has noted,
>
> > Where the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by "sophisticated argument," exclusion would seem inappropriate. In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus it could not have been a motivating force behind it. It follows that the threat of exclusion could not possibly operate as a deterrent in that situation.

Id. at 22 (citations omitted).

The court then explained how all of the attenuation factors are to be weighed, in light of the policy of deterring illegal police misconduct, stating,

> [T]he exploitation analysis requires a balancing of the relative egregiousness of the misconduct

> against the time and circumstances that intervene before the consent is given. The nature and degree of the illegality will usually be inversely related to the effectiveness of time and intervening events to dissipate the presumed taint. Where the misconduct is extreme, we will require a clean break in the chain of events between the misconduct and the consent to find the consent valid. For example, Justice Powell in Brown suggested that, where it appears from the facts that the police purposely engaged in the conduct to induce a confession, an intervening consultation with counsel or presentation before a magistrate may be required before the taint can be removed. The same type of break should be required where the evidence shows that the police purposely engaged in conduct to induce a consent. Conversely, where it appears that the illegality arose as the result of negligence, the lapse of time between the misconduct and the consent and the presence of intervening events become less critical to the dissipation of the taint.

Id. at 22 (citations omitted).

In the instant case, because Detective Russo performed the illegal arrest, not to enforce the traffic code, but in order to obtain Ms. Harmon's consent, Thurman requires the State to show a clean break in the chain of events between the illegality and the consent, equivalent to consultation with counsel or presentation before a magistrate. See id. The State cannot make any such showing on the facts of this case, wherein Ms. Harmon offered her consent, not spontaneously, but under the coercion of Detective Russo's illegal arrest and continuing pressure to allow him to search her home.

Because the State did not meet its burdens to show voluntary and untainted consent, this Court should rule that the evidence seized in the warrantless searches must be suppressed.

## II.
## MS. HARMON'S ARREST WAS ILLEGAL UNDER EITHER THE PRETEXT DOCTRINE OR SCOPE ANALYSIS.

In State v. Lopez, 831 P.2d 1040 (Utah App. 1992), the majority opinion maintained the validity of the pretext doctrine, while Judge Russon wrote a concurring and dissenting opinion in which he explained that the pretext doctrine is unnecessary in most cases because the law requires the scope of an officer's conduct to be tailored to its legitimate purpose. This Court may resolve this case on the basis of scope analysis and need not address the pretext doctrine if the Court so chooses.

### A. The Scope of Detective Russo's Conduct was Illegal.

Detective Russo's purported purpose was to enforce the traffic code prescribing driving on suspension. Rather than citing Ms. Harmon for driving on suspension, Detective Russo arrested her, handcuffed her, searched her and her belongings, and informed her that he knew that she had drugs in her house and that it would be unpleasant if he had to get a warrant to perform the search. After he obtained her consent to the search of her home and found incriminating evidence during the search of her home, he never charged her with a traffic offense. Because his conduct exceeded its proper scope, suppression is appropriate. See brief of Appellant at 16-19. The State has presented no argument to the contrary.

B. Detective Russo's Conduct Violated the Pretext Doctrine.

In the event that this Court does choose to address the pretext doctrine here, the State's arguments concerning the doctrine are addressed seriatim.

The State argues that State v. Cruz, 838 P.2d 83 (Utah App. 1992), modifies Lopez pretext analysis, and renders consideration of Detective Russo's intent to investigate drugs irrelevant to the pretext analysis. Brief of Appellee at 24. While the State's quotations from Cruz are correct, the State's argument that Cruz modifies Lopez is not. The Cruz opinion simply quotes Lopez, and there is nothing in the Cruz opinion modifying Lopez. As noted in Judge Russon's concurring opinion, the discussion of the pretext doctrine in Cruz is dicta. 838 P.2d at 85.

The State implies that under Scott v. United States, 436 U.S. 128 (1978), consideration of Detective Russo's subjective intent for assessment of his credibility is not necessary in this case because Ms. Harmon did not dispute that she was driving on suspension. Brief of Appellee at 25. The fact that Ms. Harmon was driving on suspension does not immunize Russo's credibility from scrutiny. The impeachment of his inconsistent testimony concerning the scope of the events that occurred between the arrest and the search (e.g. R. 223-224) was relevant to the legality of the entire transaction. The State's argument omits the portion of the Scott decision indicating that an officer's subjective intent is relevant not only in assessing his credibility, but also in determining whether suppression is the appropriate remedy. See Scott, 436 U.S.

at 139 n.13. See also State v. Thurman, 203 Utah Adv. Rep. 18, 22 (Utah 1993)(deterrence is most appropriate where police engage in "conduct as a pretext for collateral objectives."). As demonstrated supra, because Detective Russo arrested Ms. Harmon as a pretext for his collateral objective of obtaining her consent to conduct a warrantless search, suppression is appropriate in this case.

The State argues that under Lopez, the pretext doctrine does not apply in this case because driving on suspension is not a minor offense, but is a major offense that presumptively should result in custodial arrests. Brief of appellee at 25-27. While it is true that suspension of driving privileges may reflect that the suspended driver has posed a danger to the public in the past, id., that is not always the case. For instance, here, Ms. Harmon indicated that her license was suspended because her friend was stopped while driving one of Ms. Harmon's uninsured vehicles. While driving on suspension is not an accidental offense, id., many traffic offenses are not accidental, and yet do not result in custodial arrests. Driving on suspension in this case was a mere malum prohibitum transgression, hardly comparing to the evils posed by one driving sixty miles an hour in a residential section. Compare the facts of this case with those in State v. Cruz, 838 P.2d 83, 85 (Utah App. 1992)(pretext doctrine inapplicable where defendant was stopped while speeding at sixty miles an hour in a residential section.

The State's argument that Russo's conduct should be affirmed because driving on suspension is a serious offense misses

the critical fact in this case: Russo never enforced the law prohibiting driving on suspension. While the traffic code's prohibition of driving on suspension is surely a legitimate and important law, it was not intended to be used as it was here, as a pretext to avoid the warrant requirement in coercing Ms. Harmon's consent to the search of her home. Whatever policy considerations underly the traffic code's prohibition of driving on suspension are not at issue in this case, where the detective was merely utilizing the traffic code pretextually to obtain Ms. Harmon's consent.

The evidence presented to the trial court demonstrates that citation is the usual course of action taken by a police officer enforcing the prohibition against driving on suspension, unless the driver is intoxicated, and that at the time of Ms. Harmon's arrest, there was a presumptive no-booking policy in place at the jail for those arrested for driving on suspension (R. 233, 268-269, 272-273). The State essentially concedes that the State did not meet its burden to demonstrate that a hypothetical reasonable officer would have arrested Ms. Harmon for driving on suspension, although the State omits the portion of the test concerning whether the hypothetical reasonable officer would have made the arrest in the absence of Detective Russo's pretextual motivation. Brief of appellee at 27-30. Rather than conceding that the proper application of the governing law requires suppression of the evidence, the State proposes that this Court should modify pretext analysis and adopt the State's standard, whereby evidence is suppressed only in cases wherein an officer's conduct is theretofore

"unheard of." Brief of Appellee at 28-29. The State's argument overlooks the doctrine of stare decisis, which calls for adherence to precedents set by this Court. See e.g. State v. Thurman, 203 Utah Adv. Rep. 18, 25 (Utah 1993)(the "predictability of the law and the fairness of adjudication" require Courts to follow the Courts' own precedents). Particularly in this case involving a custodial arrest for a misdemeanor traffic offense, the State's prior argument is more convincing than its present position.

> [T]he State's argument that this Court should abandon the pretext analysis adopted in Sierra is directed only at traffic stops and does not extend to misdemeanor traffic arrests. The State shares defendant's concern that a misdemeanor traffic arrest could be misused by a police officer as a pretext to conduct a highly intrusive search of the arrested person and his or her vehicle without reasonable suspicion, probable cause, or a warrant. While an officer appears to have the authority to arrest for a misdemeanor traffic violation under Utah law, that clearly is not the usual practice.

Reply brief of Appellee in State v. Lopez, Case No. 900484-CA, at 5 (footnote omitted). While it is true that the pretext doctrine is not always a boon to obtaining and maintaining criminal convictions, brief of Appellee at 29, it is important to the integrity of the courts and to insuring that police are not abusing their powers, discriminating in the enforcement of the laws, and trying to evade the warrant requirement. See State v. Lopez, 831 P.2d 1040, 1044-1046 (explaining rationales behind pretext doctrine).

The State complains that Ms. Harmon failed to demonstrate that police officers usually used a driver's state of intoxication in deciding whether or not to make a warrantless misdemeanor traffic

arrest. Brief of appellee at 30. The State's argument misunderstands the burden of proof set forth in Lopez, "If the defendant sufficiently raises the pretext issue, the burden of proof is then ultimately upon the State to show that a reasonable officer would have made the stop absent the alleged illegal motivation." 831 P.2d 1040, 1049.

C. This Court Should Not Abandon the Pretext Doctrine.

The State criticizes the pretext doctrine, first arguing that the doctrine provides superfluous protection. Brief of Appellee at 30-33. There are frequently multiple legal approaches to one legal problem -- in civil cases, parties may choose to address a problem through tort or contract law; in criminal cases, prosecutors frequently have many criminal charges from which to select in charging a case, and defendants frequently have multiple legal defenses attaching to one factual circumstance. The fact that scope analysis and pretext analysis may overlap in some cases is no reason to deprive the Courts of either doctrine. Search and seizure cases are by their nature fact sensitive, requiring versatile legal approaches.

The State complains that the inquiry into an officer's subjective intent in the application of the pretext doctrine conflicts with the United States Supreme Court's requirement of objective analysis of Fourth Amendment issues. Brief of appellee at 33-34. As noted in Appellant's opening brief at 20-23 and accompanying notes, the objectivity rule is of questionable legal

authority and is not consistently applied by the United States Supreme Court. As trial counsel argued to the trial court (R. 149-150), and as is fully discussed in Appellant's opening brief at 19-24, this Court should hold on the basis of the Utah Constitution that the subjective intent of the officers is one relevant fact for trial courts to consider in search and seizure cases. Evaluation of one's intent is a common legal concept in civil and criminal law, and there is always circumstantial evidence available to accomplish the task. Several Utah cases demonstrate that an officer's "subjective intent," "motivation," "objective" or "purpose" may be evaluated objectively in assessing all the relevant facts and circumstances in a given search and seizure case. See State v. Thurman, 203 Utah Adv. Rep. 18, 27 (Utah 1993)(evaluating officers' purpose in violating no-knock statute, finding that the intent was self-protection, rather than to intentionally deprive Mr. Thurman of his rights); State v. Hygh, 711 P.2d 264, 268 (Utah 1985)(rejecting officer's claim of intent to perform inventory search when evidence suggestive investigative intent).

The State's complaint that an objective pretext test is difficult to apply, brief of Appellee at 35-37, is not persuasive.[7]

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7. The State would be in a better position to complain about the confusing nature of the Courts' pretext doctrine, if the State could maintain some consistency in its own arguments concerning the applicability of the doctrine. Before this Court in Lopez, the State argued, "[T]he State's argument that this Court should abandon the pretext analysis adopted in Sierra is directed only at traffic stops and does not extend to misdemeanor traffic arrests. The State shares defendant's concern that a misdemeanor

(footnote continues)

The State's formulation of the objective test excludes the relevant consideration of the officers' subjective intent, and thus, the State's complaint is directed at its own standard, rather than at the governing law defined in Lopez. Many people find all law to be conceptually difficult to work with, but this should not absolve our courts and attorneys from working hard to see that our system of government is functioning within constitutional bounds.

The State argues that the pretext doctrine is inconsistent with the Utah Constitution's requirement of separation of government powers, because the police had a duty at the time of Ms. Harmon's arrest to arrest all traffic violators. Brief of Appellee at 38. As previously noted, at the time of Ms. Harmon's arrest, the police had no duty to arrest all traffic violators because Utah Code Ann.

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(footnote 7 continued)
traffic arrest could be misused by a police officer as a pretext to conduct a highly intrusive search of the arrested person and his or her vehicle without reasonable suspicion, probable cause, or a warrant." Reply brief of Appellee in State v. Lopez, Case No. 900484-CA, at 5 (footnote omitted). While admitting to the State's concession in Lopez before this Court, the State indicates that in the Utah Supreme Court, the concession will be slightly modified, "On certiorari, the State will argue that pretext doctrine has no legitimate place in search and seizure law, at least in the context of non-arrest temporary detentions." Brief of Appellee at 9. The State apparently wishes to maintain an appearance of consistency, arguing that this case does not raise the question of a pretextual arrest because the evidence seized at the time of Ms. Harmon's arrest (prescription medication) was not encompassed in Ms. Harmon's guilty plea to possession of different evidence seized from her home (methamphetamine). Brief of Appellee at 12. The State then concedes that a pretextual arrest provides a more compelling case for the application of the pretext doctrine than does a traffic stop, brief of Appellee at 23, but later argues that the pretext doctrine should be abandoned altogether, or be "tightly ... restricted in application" to "highly unusual arrest[s] for [] obviously minor offense[s]," brief of Appellee at 30-40.

section 77-7-18 provided the option to resolve traffic violations with citations. More importantly, the pretext doctrine does not require courts and the police to "trump" the legislature by selecting which traffic laws should be enforced. The doctrine does not deprive the police of the opportunity to enforce any traffic laws; it forbids the police from manipulating the traffic laws to suit ulterior illegal ends, such as evasion of the warrant requirement and violation of principles guaranteeing equal protection of the laws. Ms. Harmon has never argued that Detective Russo should not have enforced the code's proscription of driving on suspension (which he never did); she has argued that the evidence he obtained without a warrant by arresting her for the misdemeanor traffic offense and otherwise coercing her consent should be suppressed. See State v. Lopez, 831 P.2d 1040, 1046 (Utah App. 1992)("The pretext doctrine does not restrict the state legislature from enacting traffic regulations, nor does it facially invalidate any traffic regulation. Rather, the pretext doctrine restricts police discretion when used unconstitutionally.").

The State argues that Ms. Harmon had no "reasonable expectation of privacy" in driving on suspension, and that she had "no constitutional right to be a 'scofflaw.'" Brief of Appellee at 39. She did, however, have reasonable expectations of privacy in the legitimate scope of the misdemeanor traffic stop, and in her car, her person and her home, which were infringed by Detective Russo's pretextual conduct. Again, Ms. Harmon has never begrudged Russo's authority to issue a citation for her driving on suspension;

her complaint is that he asserted but never enforced the traffic code in order to evade the warrant requirement. The State's argument concerning reasonable expectations of privacy overlooks the fact that the pretext doctrine is not based solely on Fourth Amendment/Article I section 14 premises. As the Lopez Court explained, the doctrine also serves legitimate interests in equal protection of the laws and in maintaining the integrity of the courts. See State v. Lopez, 831 P.2d 1040, 1045-1046 (Utah App. 1992).

## CONCLUSION

The State has failed to demonstrate that Detective Russo's conduct can be justified on the basis of Ms. Harmon's consent. This Court should reverse the trial court's denial of Ms. Harmon's motion to suppress.

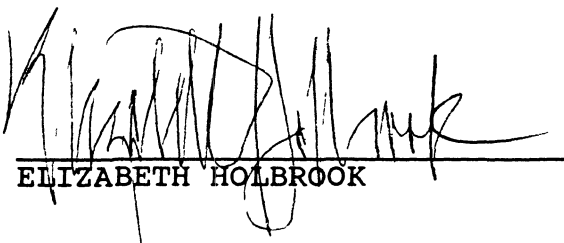
RESPECTFULLY SUBMITTED this 11 day of March, 1993.

MARK R. MOFFAT
Attorney for Ms. Harmon

ELIZABETH HOLBROOK
Attorney for Ms. Harmon

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and four copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 11 day of March, 1993.



ELIZABETH HOLBROOK

DELIVERED this _____ day of March, 1993.

# APPENDIX 1

## Statute

## TEXT OF STATUTE

Utah Code Ann. section 77-7-18 states:

> A peace officer, in lieu of taking a person into custody, any public official of any county or municipality charged with the enforcement of the law, and personnel employed at an inspection and checking station or port of entry under Section 27-12-19 may issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor or infraction charge to appear at the court of the magistrate before whom the person should be taken pursuant to law if the person had been arrested."